In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1137

CARLO BIANCHI AND COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This petition challenges the propriety of the unanimous ruling of the Court of Claims that an administrative decision rendered pursuant to a standard disputes clause of a government contract was supported by substantial evidence in the administrative record. That court (per Mr. Justice Reed, Ret.) applied settled principles of judicial review to the record of this case (Pet. App. 3a). Since the petition presents no issue of general importance or application, and the decision below was correct, there is no occasion for review by this Court.

1. In an earlier stage of the instant proceeding, this Court held that judicial review under the Wun-

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derlich Act (41 U.S.C. 321, 322) of administrative decisions rendered pursuant to the standard disputes clause of government contracts was limited to a review on the administrative record, and that the reviewing court may not receive additional evidence. *Carlo Bianchi & Co.* v. *United States,* 373 U.S. 709. Accordingly, the Court reversed the prior decision of the Court of Claims which had been based upon new evidence received in that Court, and remanded this case for further proceedings. 373 U.S. at 718. Upon remand the parties agreed that the only issue before the Court of Claims was whether the decision of the Board of Claims and Appeals of the Corps of Engineers was supported by substantial evidence.

The dispute between the contracting parties concerned whether permanent tunnel protection, consisting of steel supports and liner plates, should be placed at government expense throughout the whole of a 710-foot water-diversion tunnel. The specifications required such protection to be placed only for fifty feet at either end. Petitioner initially requested authorization to install the additional supports because of dangers to its workmen (R. 242, 244–245). The contracting officer denied the request, on the ground that the expense for temporary tunnel protection for the safety of the workers was to be borne by the contractor under the express terms of the contract, and that adequate temporary tunnel protection could be obtained by the use of timber lagging (R. 247–249).

From this decision petitioner appealed to the Board

of Claims and Appeals on the ground that the rock encountered in the construction of the tunnel was of an unexpected nature, requiring permanent steel supports at additional expense which should be borne by the government under the "changed conditions" article of the contract. The Board affirmed the contracting officer's decision, resolving in the government's favor the sharp conflict in the testimony of the expert witnesses as to the necessity for permanent supports (R. 167–177). The Board found that the rock conditions encountered underground were those which should reasonably have been expected, that the rock falls which did occur resulted from the failure of the petitioner to place the concrete lining promptly, and that in the few places where any protection was necessary because of those rock falls the support could have been achieved with relatively little temporary protection (R. 175–176). Accordingly, it ruled that no changed conditions were encountered which would have required the installation of permanent steel supports (R. 176).

The Court of Claims, in an opinion by Mr. Justice Reed, unanimously ruled that there was substantial evidence in the record to support the Board's findings and ruling (Pet. App. 6a, 10a–14a). Noting that the government geologist had expressly stated his opinion that only temporary tunnel protection was necessary, and then only in a few places, and that this testimony was at most only inferentially denied by petitioner's

expert, the Court of Claims ruled that the finding of the Board that only "relatively little temporary protection" was necessary (R. 176) was amply supported by the record (Pet. App. 10a–11a). In so doing it rejected the contention of the petitioner that the encasement of the protection in concrete would transform what the government expert described as "[s]hort lengths of temporary protection" (R. 138) into permanent protection, and ruled instead that under the specifications the only "permanent" support for which the government agreed to pay was that which was necessary for the permanent support of the tunnel (Pet. App. 11a). Similarly, the Court noted that there was a direct conflict in the critical expert testimony as to whether the rock conditions could reasonably have been anticipated, and ruled that the Board's finding that there were no changed or unanticipated conditions was supported by the evidence (Pet. App. 13a–14a).

2. This petition challenges only the application to the facts of this case of settled principles of judicial review. Petitioner contends that that Court resolved a factual question "not presented to and not considered" by the Board, namely whether it was necessary for the petitioner to install steel supports throughout the length of the tunnel (Pet. 9). But the Board specifically accepted the testimony of a geologist who had inspected the tunnel that no support of any kind

was necessary for the greater portion of the tunnel, and that the relatively small areas requiring protection could have been supported with "relatively little temporary protection." It thus decided the question in the negative (R. 173, 176).

Petitioner's real complaint on this score appears to be that the Court of Claims interpreted the specifications as requiring the government to increase the contract price only if steel liner supports were required for permanent structural support of the tunnel (Pet. 10–13).[1] Petitioner argues that the protection which the government's expert described as "temporary" was "permanent" within the meaning of the specifications because the ribs would have been covered over with cement and would remain in the tunnel (Pet. 13). We agree with the Court of Claims and the Board that, by imposing upon the contractor the responsibility of erecting "temporary tunnel protection * * * where required for the safety of workmen," the specifications contemplated that, in the absence of unanticipated conditions, the petitioner would be obliged to install any tunnel protection needed only for the period of construction at its own expense, that

[1] Any suggestion that the Board did not interpret the specifications in the same way (Pet. 9, 13) is refuted by petitioner's own statement (Pet. 15) that the Board implicitly held that the petitioner was obliged to pay, out of the contract price, for any tunnel protection which was necessary only during the period the tunnel was being constructed.

is, out of the fixed contract price (Pet. 11a). At any rate, the issue of the proper interpretation of the specifications of the particular contract involved is hardly one of general importance warranting review by this Court.

Petitioner also urges that the Court of Claims erred in treating the question of the interpretation of contractual specifications as an issue of fact within the coverage of the standard disputes clause, rather than as one of law for the court (Pet. 14–16). We believe that where, as here, extrinsic evidence is introduced as an aid in the interpretation of a written instrument, the issue of interpretation is a factual one, to be resolved by the finder of fact.[2] Indeed, when it was previously before this Court, petitioner conceded that the issues in this case were within the coverage of the disputes clause. 373 U.S. at 714. At any rate, in ruling that (Pet. App. 11a) "This interpretation seems inescapable to us" the Court of Claims was

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[2] *West* v. *Smith*, 101 U.S. 263, 269–270; *Rankin* v. *Fidelity Trust Co.*, 184 U.S. 242, 252–253; 3 Williston, *Contracts* (Rev. ed., 1936), § 616. For the same reason, the courts have held that such issues are disputes of fact within the meaning and coverage of the disputes clause. *Lowell O. West Lumber Sales* v. *United States*, 270 F. 2d 12 (C.A. 9); *M. Berger* v. *United States*, 199 F. Supp. 22, 26–27 (W.D. Pa.). See also, *United States* v. *A. J. McKinnon*, 289 F. 2d 908 (C.A. 9). Indeed, the Court of Claims itself appears to have concluded recently that factual issues connected with issues of contract interpretation are disputes within the meaning and coverage of the disputes clause. *Morrison Knudsen Co.* v. *United States* (Ct. Cl. No. 239–61, May 14, 1965).

obviously exercising its independent judgment as to the proper interpretation of the specifications, thereby rendering moot any contentions as to whether it should be considered a question of fact or one of law.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

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No. 114

CARLO BIANCHI AND COMPANY, INC., *Petitioner*

v.

UNITED STATES, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals

REPLY TO MEMORANDUM IN OPPOSITION

ROBERT F. BRADFORD
53 State Street
Boston, Massachusetts 02109
Attorney for Petitioner

WILLIAM H. MATTHEWS
821 - 15th Street, N. W.
Washington, D. C. 20005
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The first reason advanced by petitioner for granting the writ is that the Court of Claims improperly exercised appellate jurisdiction in basing its decision upon a determination of a factual question, whether the steel supports were necessary for the permanent support of the tunnel, a question not presented to and

not considered by the Claims and Appeals Board. Respondent misstates petitioner's position, saying:

> "... Petitioner contends that that Court resolved a factual question not presented to and not considered by the Board, namely whether it was necessary for the petitioner to install steel supports throughout the length of the tunnel."

To the contrary, the petition reads:

> "The decision below is based upon the Court of Claims determination of a factual issue not presented to and not considered by the Claims and Appeals Board. The Court properly states that the critical issue is whether it was necessary for petitioner to install steel supports throughout the length of the tunnel. However, in resolving that issue, the Court states in substance that no recovery is proper unless the steel supports were required for the permanent support and maintenance of the tunnel. (App., p. 11a, 3rd par.). This issue was never before the Board. There the issue was whether or not it was necessary to install the permanent steel supports before the concrete lining of the tunnel could be accomplished . . . ."

The Board resolved this issue in favor of the Government primarily on the grounds that the rockfalls would not have occurred had petitioner commenced the concrete lining sooner after the holing out of the tunnel and had petitioner sealed up the tunnel to prevent any air slaking. (R. 175, 176). The Court below states that the Board's views on the cause of the rockfalls "do not constitute the basis of our affirmance". (Pet. 12a). The decision of the Court of Claims rests in the main first, upon its determination that no recovery is proper unless the steel supports were required for the permanent support and maintenance of

the tunnel (Pet. 11a) and secondly, its interpretation of the provision of the specifications for "temporary tunnel protection . . . where required for the safety of the workmen," as obligating petitioner to install any tunnel protection needed to protect the workmen while the job was being completed. (Pet. 11a, 12a).

Petitioner's statements that no witness before the Board indicated that the steel supports were necessary for the permanent support of the tunnel and that the Government design engineer testified to the effect that steel supports were not intended to serve this purpose (Pet. 10) stand unquestioned by respondent. Respondent's footnote reference in this regard to "petitioner's own statement (Pet. 15)" is an obvious misinterpretation of petitioner's statement (Resp. memo 5).

Nor as indicated above, is there any basis for respondent's position that the Court of Claims held that "by imposing upon the contractor the responsibility of erecting 'temporary tunnel protection . . . where required for the safety of workmen,' the specifications contemplated that in the absence of unanticipated conditions, the petitioner would be obliged to install any tunnel protection needed only for the period of construction at is own expense, . . .". (Resp. memo 5). The Court below in fact held only that the "temporary protection" provision "for the safety of workmen", which by its very terms was confined to the tunnel bore excavation operation, obliged petitioner to install at its own expense any tunnel protection needed to protect its men in the course of the whole construction. The Court overlooked the fact, undisputed by respondent, that as testified by the government's own expert witness, if steel supports were not installed before

concreting in the areas of major rockfalls, the tunnel could not have been successfully lined with concrete "without danger to personnel or *structure*" (emphasis supplied). Respondent does not comment on the testimony of this expert witness which establishes that the steel supports he deemed necessary for a limited area in order to successfully line the tunnel with concrete were for the purpose of preventing rock movement that would damage the concrete before it had a chance to harden. (Pet. 6, 9, 10).

Had the Court of Claims interpreted the temporary tunnel protection provisions of the specifications as indicated by respondent, obliging petitioner to install any tunnel protection needed for the period of construction at its own expense, (Resp. memo 5), such an interpretation would have nullified the other provisions of the specifications that permanent tunnel protection was to be installed prior to lining the tunnel with concrete beyond the fifty feet from the portals where "required" or "directed" by the Contracting Officer. These provisions were inserted in the specifications because the respondent anticipated that in the course of the tunnel construction conditions might be encountered which required the additional tunnel protection in order to accomplish the placement of the concrete lining of the tunnel and petitioner bid the job on that basis. (Pet. 4, 12, 13).

Respondent seeks to justify the Court of Claims application of the substantial evidence rule to the Board's interpretation of the temporary protection provision of the specification in the following language:

> "... We believe that where, as here, extrinsic evidence is introduced as an aid in the interpretation

of a written instrument, the issue of interpretation is a factual one, to be resolved by the finder of fact'' (Resp. memo 6).

The extrinsic evidence introduced before the Board related to the causes of the rockfall, a matter not considered as determinative by the Court below, and also to the need for the steel supports throughout the whole length of the tunnel before placement of the concrete lining could be accomplished. The extrinsic evidence was not conflicting as to the need for the steel supports, similar to those installed by petitioner, in three areas of major rockfalls comprising about 100 feet of tunnel length. Thus the Board's interpretation of the contract specifications in the present case still remains a question of law. (Williston Contracts Rev. ed., 1961 Section 616).

If it can be said, as stated by respondent (Resp. memo 7) that the Court of Claims exercised its independent judgment as to the proper interpretation of the specifications, its interpretation is meaningless when applied to the undisputed fact that additional steel supports were necessary before the concrete lining could be accomplished and needed to provide protection against damage to completed works as well as incidentally to protect the workmen.

Petitioner respectfully submits that respondent's memorandum in opposition lends no support to the holding of the Court of Claims that no recovery is proper unless it can be said that the steel supports were required for the permanent support of the tunnel, a question not presented to and not considered by the Claims and Appeals Board, and petitioner reaffirms its contention that the Court of Claims also improperly

exercised appellate jurisdiction in applying the substantial evidence rule, thereby attaching finality, to the Board's interpretation of the specifications as applied to admitted facts, a question of law.

Respectfully submitted,

ROBERT F. BRADFORD
53 State Street
Boston, Massachusetts 02109
Attorney for Petitioner

WILLIAM H. MATTHEWS
821 - 15th Street, N. W.
Washington, D. C. 20005
Of Counsel

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